Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishing Rules and Policies for the	)	**IB Docket No. 96-132**
Use of Spectrum for Mobile Satellite	)	
Service in the Upper and Lower L-Band	)	

To: The Commission

COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group ("RTG"), by its attorneys, hereby respectfully submits these Comments in response to the Notice of Proposed Rulemaking ("NPRM"), released by the Federal Communications Commission ("FCC" or "Commission") on June 18, 1996, in IB Docket No. 96-132. These Comments focus on the approach the Commission has taken in its proposal for licensing the available frequencies in the upper and lower L-band, and the inherent unfairness of this proposal with regard to the interest of small and/or rural telecommunications ("telecom") providers.

I. STATEMENT OF INTEREST

RTG is a group of progressive rural telephone companies that endeavors to educate the Commission on policies and decisions that adversely impact RTG's members' abilities to swiftly and efficiently deliver the most innovative and economical services to their customers in rural America. The Commission's proposal to "give" American Mobile Satellite Corporation ("AMSC") 28 megahertz of L-band spectrum, if adopted, would exaggerate the

tilt of an already un-level playing field in the area of rural telecommunications service provision. As potential competitors of AMSC, RTG's members would be adversely affected by adoption of the Commission's proposal.

II. COMMENTS

A. Awarding AMSC L-Band Spectrum Without Competition Contravenes Section 309(j)(3) of the Communications Act of 1934, as Amended

Section 309(j)(3) of the Communications Act of 1934, as amended, prescribes the use of competitive bidding for, *inter alia*, avoiding excessive concentration of licenses,[1] and recovering for the public a portion of the value of the spectrum made available for commercial use while avoiding unjust enrichment through the methods employed to award uses of that resource.[2] The Commission's proposal to extend exclusive use of the upper and lower L-band to AMSC would make AMSC the monopoly provider of domestic mobile satellite service ("MSS"), and contradict the federal mandate of avoiding excessive concentration of licenses.

Authorizing AMSC's exclusive use of the coordinated L-band frequencies without requiring AMSC to pay for this privilege deprives the public of its portion of the value of this spectrum, while unjustly enriching AMSC. The Commission already assumes that MSS

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[1] 47 U.S.C. § 309(j)(3)(B).

[2] 47 U.S.C. § 309(j)(3)(C).

systems are economically viable.[3] As the sole licensee of domestic MSS service, AMSC stands to reap all the profits from providing MSS service itself and/or leasing capacity to provide this service to other entities. Therefore, aside from its investment in the construction of the system itself — which is an investment that all FCC licensees are required to make, regardless of the economic viability of the particular service — AMSC does not have to recoup monies spent on the acquisition of the license through the auction process. Since the advent of the competitive bidding system, all CMRS licensees have had to locate and invest substantial sums of money to procure their licenses, so that the public (to whom the spectrum belongs) could recoup a portion of the spectrum's value. In comparison to all these other licensees, who had to pay the public for their right to utilize this national resource, AMSC will be unjustly enriched by the Commission's proposal to hand over 28 megahertz of valuable spectrum without requiring just compensation for the public. Furthermore, it is inequitable to require rural telecom providers to participate in auctions and pay a premium for spectrum in order for them to compete in the provision of services that can be offered by AMSC, who has not had to bid for the opportunity to serve rural America.

B. The Commission is Acting Beyond the Scope of Its Authority By Refusing to Entertain Competing Applications

The Commission tentatively concludes that it has the broad authority to permit an existing licensee, AMSC, to exclusively use the upper and lower L-band frequencies, and to

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[3] *In re* Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band, *Notice of Proposed Rulemaking*, IB Docket No. 96-132 (released June 18, 1996), at ¶ 15 ("*L-Band NPRM*").

treat the addition of newly allocated lower L-band frequencies as a modification of AMSC's extant license, free from challenge by competing applicants.[4] RTG questions this authority and the basis on which the Commission asserts it.

The Commission cites *Rainbow Broadcasting v. FCC* as the foundation for its authority to refrain from opening the lower L-band frequencies to competing applications.[5] This case bears little relevance to the issue at hand. The policy that the Commission implemented in *Rainbow Broadcasting* involved a channel exchange between a commercial broadcaster and a non-commercial educational broadcaster that was permitted to occur without competition from third parties. Both broadcasters were concurrently serving the same market, and the swap benefitted the educational broadcaster financially while assisting the commercial broadcaster technically. In the instant proposal, the lower L-band is comprised of open frequencies that currently belong to no one but the public. There is no "swap" to be transacted, unless the public has agreed to "swap" its interest in a portion of the value of this spectrum for the ability of AMSC to become the monopoly provider of MSS.

The FCC must apply the principles of the "*Ashbacker* doctrine" to this proceeding.[6] Under *Ashbacker*, the U.S. Supreme Court requires the Commission to hold hearings to compare competing applications for free channel space. The Court held that when the Commission receives mutually exclusive applications for an open frequency from two or more qualified applicants, it must treat them equally; it cannot grant one application and require the

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[4] *L-Band NPRM* at ¶¶ 23-4.

[5] 949 F. 2d 405 (D.C. Cir. 1991).

[6] *Ashbacker Radio Co. V. FCC*, 326 U.S. 327 (1945).

others to compete against an "incumbent."[7] Section 309(j) of the Communications Act has virtually replaced the comparative hearing with competitive bidding, but the underlying principles remain the same.

Currently, AMSC is the only authorized MSS licensee in the United States.[8] In 1986, eight individual applicants formed the consortium that is AMSC, for the purpose of licensing all of the available frequencies in the upper L-band (1545-1559 MHz and 1646.5-1660.6 MHz) to provide domestic MSS services. That there were once eight individual applicants indicates that this spectrum is of interest to more entities than AMSC. In fact, when the Commission proposed to allocate frequencies in the lower L-band (1530-1544 MHz and 1626.5-1645.5 MHz), four entities requested that the Commission open these frequencies "immediately for the filing of applications proposing service competitive with AMSC's."[9]

Although it is beyond denial that competing applicants for lower L-band spectrum exist, the Commission has chosen to essentially ignore their existence. Although the Commission has recognized that "[o]pening the lower L-band for competing applications would present at least a theoretical possibility for a second U.S. licensee to begin providing

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[7] *Id.* at 330-3.

[8] In 1989, the FCC issued a license to AMSC to construct, launch and operate a three-satellite MSS system in the upper L-band. *See In re* Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and Establish Rules Pertaining to the Use of Radio Frequencies in Land Mobile Satellite Services, *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989).

[9] These requests for leave to file competing applications were submitted by Constellation Communications, Inc., Loral Qualcomm Satellite Services, Inc., Motorola Satellite Communications, Inc., and TRW Inc. *See In re* Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for Mobile-Satellite Services in the 1530-1544 MHz and 1626.5-1645.5 MHz Bands, *Second Report and Order*, 10 FCC Rcd 7305, 7306 (1995).

MSS in the L-band in competition with AMSC,"[10] it nonetheless "doubts" whether there is enough L-band spectrum capable of coordination to support another MSS system.[11] It is highly unlikely that four separate entities would petition the Commission to open the lower L-band for competing applications unless each saw the possibility of being able to provide MSS service on these frequencies.

In defense of its proposal, the Commission "note[s] that this proceeding does not involve initial applicants and the hearing rights of eligible new applicants under Section 309 of the Act."[12] The reason why the proceeding does not involve eligible new applicants is because the Commission has refused to permit any entity other than AMSC to file for these frequencies. Even a cursory examination of the Commission's procedural history with regard to the allocation of L-band frequencies reveals an overt trend of favoritism. In January, 1990, just prior to the Commission's initiation of the lower L-band allocation proceeding, AMSC filed an application requesting authorization to operate in the lower L-band. When the Commission released the *Lower L-Band Notice*, it stated that it would not accept applications for a permanent MSS system until the allocation proposals were finalized.[13] In July, 1993, one month after the Commission released the *Lower L-Band Notice*, and ostensibly at the point when competing applications could be filed for the newly allocated frequencies, AMSC

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[10] *L-Band NPRM* at ¶ 10.

[11] *Id.* at ¶ 11.

[12] *Id.* at ¶ 24.

[13] *In re* Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for Mobile Satellite Services in the 1530-1544 MHZ and 1626.5-1645.5 MHZ Bands, *Notice of Proposed Rulemaking*, 5 FCC Rcd 1255, 1258 n.23 (1990) ("*Lower L-Band Notice*").

filed an amendment to its lower L-band application asking the Commission not to accept competing applications.[14] Subsequently, the Commission, on its own motion, refused to accept applications from any entity other than AMSC, despite the fact that interested applicants exist. It is disingenuous at best, then, for the Commission to defend AMSC's exclusive authorization on the premise that this proceeding does not involve the hearing rights of eligible new applicants.

The newly allocated frequencies in the lower L-band are open channels that hold the potential for the introduction of competition in the MSS service. Despite the mandate of Section 309(j) of the Communications Act to promote competition in the provision of telecommunications services by avoiding the excessive concentration of licenses, the Commission is proposing to award a monopoly interest in MSS to AMSC. The fact that potential competitors have come forward to request the ability to file mutually exclusive applications for the use of these channels should obligate the Commission to put the spectrum on the auction block, and let the industry decide how to technologically manage the use of the spectrum.

C. Awarding MSS Licenses to AMSC Without Subjecting Such Licenses to Competitive Bidding Adversely Affects Rural Telecom Providers

The Commission is obligated by section 603 of the Regulatory Flexibility Act to pay careful attention to the affects of its proposed action on rural telecom providers. The Commission's proposal to award AMSC the frequencies it requires in the L-band, without

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[14] *L-Band NPRM* at ¶ 6.

subjecting it to the financial rigors of an auction, has a significant impact on rural telecom providers. The Commission characterizes MSS as a technology that is well-suited to "serve areas of the country that are too remote or sparsely populated to be served by terrestrial land mobile systems," and "meet rural safety needs."[15] RTG reminds the Commission that rural telecom providers have been serving such areas and meeting such needs for a very long time. As wireless technologies develop, rural telecom providers are consistently at the head of the line to bring these services to their rural customers and public safety agencies. They are licensing these technologies at considerable cost, due to the fact that rural telephone companies receive few, if any, designated entity preferences to assist in their auction participation. If the Commission's proposal is adopted, AMSC, unlike rural telecom incumbents, will be able to enter rural markets with the advantage of not having had to pay a premium for the license it holds, thereby affording AMSC a significant and unfair competitive advantage.

Under the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), the Commission must undertake a comprehensive Regulatory Flexibility Analysis, to consider all the alternatives to handing AMSC these frequencies, and the impact each would have on rural telecom providers.[16] The ideal solution to the dearth of available L-band channels is to make such channels available for uses other than MSS. If the L-band can truly support only one MSS provider, then the Commission should consider auctioning this spectrum for

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[15] *Id.* at ¶ 12.

16 5 U.S.C. § 601, *et seq.*

alternative wireless land mobile and/or point-to-point or point-to-multipoint microwave services. Aside from the need to protect the aeronautical mobile-satellite (R) service from harmful interference, there are no other apparent limitations on the uses that can be made of the lower L-band frequencies. Opening these frequencies for public bid to provide a variety of services is a far more efficient use of limited spectrum than awarding it all to one entity for one type of service. In the event that the Commission decides to adopt its proposal, AMSC should contribute the value of these frequencies to the U.S. Treasury. Because it is inaccurate, at best, to try to determine the value of the L-band spectrum in a vacuum, the surest way to ensure that the public receives its monetary due and the playing field is leveled for all wireless providers, is to hold an auction. The only way for the Commission to fulfill its duties under Section 309(j) of the Communications Act and SBREFA is to give generous and open-minded consideration to all the alternative proposals it receives in this proceeding, and analyze each proposal with regard to its potential effect on rural telecom providers.

III. CONCLUSION

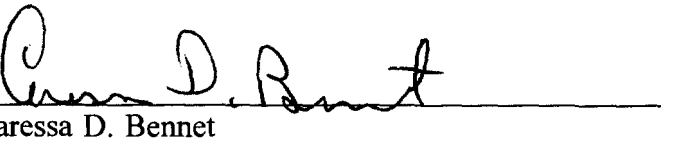
The Commission seems to have arrived at this proposal out of sympathy for AMSC's plight. Yet, AMSC, like any other MSS licensee, was aware from the date of license grant that satellite authorizations are conditioned upon the outcome of coordination, and subject to the effects of prior international coordination. AMSC's situation is not unique. There are countless other licensees who have gambled the cost of undertaking construction of a telecommunications system, only to lose the investment as a result of the conditions placed on

the related license. The Commission is not known for making decisions on the basis of its pity for licensees who have lost their investments, and it should not start now.

The Commission's lower L-band proposal is patently unfair to others, especially rural telecom providers who will be direct competitors with AMSC. RTG respectfully requests that the Commission reject this proposal, and either subject the L-band frequencies to competitive bidding or require AMSC to recompense the federal treasury in some comparable fashion for the right to utilize those frequencies.

Respectfully submitted,

RURAL TELECOMMUNICATIONS GROUP

By: 

Caressa D. Bennet
Dorothy E. Cukier

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Bennet & Bennet, PLLC
1019 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 530-9800